

1 Robert A. Mittelstaedt (Bar No. 60359)
2 Jason McDonell (Bar No. 115084)
3 Brian D. McDonald (Bar No. 224201)
JONES DAY
3 555 California Street, 26th Floor
San Francisco, CA 94104
4 Telephone: (415) 626-3939
Facsimile: (415) 875-5700
5 E-mail: ramittelstaedt@jonesday.com
E-mail: jmcdonell@jonesday.com
6 E-mail: bdmcdonald@jonesday.com

7 Shay Dvoretzky (*Admitted Pro Hac Vice*)
JONES DAY
8 51 Louisiana Avenue, N.W.
Washington, D.C. 20001-2113
9 Telephone: (202) 879-3939
Facsimile: (202) 626-1700
10 E-mail: sdvoretzky@jonesday.com

11 Attorneys for Defendant
JONES DAY
12

13 UNITED STATES DISTRICT COURT
14 NORTHERN DISTRICT OF CALIFORNIA
15 OAKLAND DIVISION

16
17 **In re:**
18 **HOWREY LLP,**
19 **Debtor.**

20 **ALLAN B. DIAMOND, Chapter 11**
21 **Trustee for Howrey LLP,**

22 **Plaintiff,**

23 **v.**

24 **JONES DAY,**
25 **Defendant.**

Case No. 4:13-CV-03910-SBA
STIPULATION AND [PROPOSED]
ORDER REGARDING DEFENDANT
JONES DAY'S MOTION TO WITHDRAW
THE BANKRUPTCY COURT
REFERENCE

Judge: Hon. Saundra Brown Armstrong

1 Plaintiff Liquidating Debtor Howrey LLP (“Plaintiff”) and Defendant Jones Day
 2 (“Defendant”) respectfully submit the following Stipulation and Proposed Order pursuant to Civil
 3 Local Rule 7-12.

4 WHEREAS, on August 15, 2013, Defendant filed a Motion to Withdraw the Reference to
 5 the Bankruptcy Court (“Motion to Withdraw the Reference”) (ECF No. 11), which is pending
 6 before this Court;

7 WHEREAS, Defendant contends that new allegations contained in Plaintiff’s Amended
 8 Complaint filed on March 27, 2014 are relevant to Defendant’s pending Motion to Withdraw the
 9 Reference;

10 WHEREAS, Defendant seeks leave to file a supplemental brief regarding the new
 11 allegations contained in Plaintiff’s Amended Complaint, and a copy of the proposed supplemental
 12 brief is attached hereto as **Exhibit A** (“Supplemental Brief”);

13 WHEREAS, Plaintiff has reviewed Defendant’s Supplemental Brief and does not oppose
 14 Defendant’s request to file the Supplemental Brief provided that Plaintiff is given leave to file a
 15 Supplemental Opposition brief two weeks later; and

16 WHEREAS, Plaintiff and Defendant agree that no reply brief is necessary, and neither
 17 party is prejudiced by this Court granting the parties leave to file these supplemental briefs.

18 THEREFORE, THE PARTIES STIPULATE AND AGREE, through their respective
 19 counsel, subject to Court approval, that:

- 20 1. Defendant may file the Supplemental Brief attached hereto as Exhibit A.
- 21 2. Plaintiff may file a Supplemental Opposition to Defendant’s Supplemental Brief
 22 not to exceed five (5) pages no later than two weeks after Defendant files its Supplemental Brief.
- 23 3. No reply brief shall be filed.

24 ///

25 ///

26 ///

27 ///

28 ///

1 IT IS SO STIPULATED.
2

3 Dated: May 6, 2014

DIAMOND McCARTHY LLP

5 By: /s/ Andy Ryan
6 Andy Ryan

7 Attorneys for Plaintiff
8 HOWREY LLP, Liquidating Debtor

9 Dated: May 6, 2014

10 JONES DAY

11 By: /s/ Jason McDonell
12 Jason McDonell

13 Attorneys for Defendant
14 JONES DAY

15 **SIGNATURE ATTESTATION**

16 I hereby attest that concurrence in the filing of this document has been obtained from all
17 persons whose signatures are indicated by a "conformed" signature (/s/) within this e-filed
18 document.

19 Dated: May 6, 2014

20 JONES DAY

21 By: /s/ Jason McDonell
22 Jason McDonell
23 Attorneys for Defendant
24 JONES DAY

25 PURSUANT TO STIPULATION, IT IS SO ORDERED

26
27 
28 HON. SANDRA BROWN ARMSTRONG
DISTRICT COURT JUDGE

STIPULATION AND [PROPOSED] ORDER RE
JONES DAY'S MOT. TO WITHDRAW
REFERENCE

EXHIBIT A

1 Robert A. Mittelstaedt (60359)
2 Jason McDonell (115084)
3 Brian D. McDonald (224201)
4 JONES DAY
5 555 California Street, 26th Floor
6 San Francisco, CA 94104
7 Telephone: (415) 626-3939
8 Facsimile: (415) 875-5700
9 E-mail: ramittelstaedt@jonesday.com

Shay Dvoretzky (*Admitted Pro Hac Vice*)
JONES DAY
51 Louisiana Avenue, N.W.
Washington, D.C. 20001-2113
Telephone: (202) 879-3939
Facsimile: (202) 626-1700
E-mail:sdvoretzky@jonesday.com

6 Attorneys for Defendant
7 JONES DAY

8 UNITED STATES DISTRICT COURT
9
10 NORTHERN DISTRICT OF CALIFORNIA
11
12 OAKLAND DIVISION

13 **In re:**
14 **HOWREY LLP,**
15 **Debtor.**

CASE NO. 11-31376 DM
Chapter 11
ADV. PROC. NO. 13-03093
**JONES DAY'S SUPPLEMENTAL
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION TO WITHDRAW THE
BANKRUPTCY COURT REFERENCE**

20 **ALLAN B. DIAMOND, Chapter 11**
21 **Trustee for Howrey LLP,**
22 **Plaintiff,**

Date: TBD
Time: TBD
Judge: Hon. Saundra Brown Armstrong

23 **v.**
24 **JONES DAY,**
25 **Defendant.**

1 **I. INTRODUCTION**

2 On August 15, 2013, Jones Day filed a motion to withdraw the reference to the
 3 Bankruptcy Court. (ECF No. 11.) That motion remains pending. Jones Day respectfully submits
 4 this supplemental brief to inform the Court of recent developments that underscore the need for
 5 this Court to withdraw the reference.

6 The Trustee of the estate of Howrey LLP has now filed an Amended Complaint against
 7 Jones Day, seeking to recover profits that Jones Day earned on matters for which clients
 8 discharged Howrey and retained Jones Day. The Trustee's Amended Complaint alleges that law
 9 firms that take on partners who leave other law partnerships (including financially healthy firms)
 10 must remit to the prior firm all profits earned by the new firm on matters that the prior firm
 11 previously handled. If accepted, such a rule would impede attorney mobility, impair client choice
 12 and generally open the floodgates of litigation among law firms. Because this issue turns entirely
 13 on state law, the Bankruptcy Court has no special expertise. Moreover, whatever the Bankruptcy
 14 Court decides must eventually be reviewed *de novo* by this Court.

15 Rather than continuing to refer this issue to the Bankruptcy Court for what could be
 16 several years of unnecessary litigation, this Court should withdraw the reference and decide the
 17 issue sooner than later, thereby promoting the interests of judicial economy and certainty of the
 18 law in this important area.

19 **II. RECENT DEVELOPMENTS**

20 After filing its motion to withdraw the reference, Jones Day filed a motion to dismiss the
 21 Original Complaint in the Bankruptcy Court. (ECF No. 17.) On February 7, 2014, the
 22 Bankruptcy Court (Judge Dennis Montali, presiding) issued proposed conclusions of law granting
 23 that motion in part and denying it in part. (ECF No. 28.)

24 The Bankruptcy Court denied Jones Day's motion to dismiss with respect to matters for
 25 which clients retained Jones Day *after* Howrey dissolved ("the post-dissolution matters").
 26 Relying on its previous decisions in the Heller and Brobeck bankruptcies, the Court summarily
 27 concluded that a third-party law firm that takes on former partners of a dissolved firm, and that
 28

1 clients retain to handle matters that the dissolved firm abandoned, has a state-law duty to account
 2 to the dissolved firm for profits earned by the third-party from such representations. (ECF No. 28
 3 at 22-24.)

4 The Bankruptcy Court granted Jones Day's motion to dismiss the Original Complaint with
 5 respect to matters for which clients retained Jones Day *before* Howrey dissolved ("the pre-
 6 dissolution matters"), but the Court allowed Plaintiff to replead those claims. Plaintiff had argued
 7 that a *Jewel* Waiver adopted by the Howrey partners fraudulently transferred Howrey's claimed
 8 right to profits from the pre-dissolution matters to the partners, who in turn purportedly
 9 transferred those profits to third-party firms like Jones Day. The Court explained that, on the date
 10 on the *Jewel* Waiver, "profits on pre-dissolution matters no longer belonged to [Howrey]" and
 11 "[the] business itself and any future profits to be realized on it was no longer property of Debtor
 12 that could have been subsequently disposed of by the *Jewel* Waiver." (ECF No. 28 at 20.) For
 13 this reason, the Court dismissed Plaintiff's fraudulent transfer claims as to the pre-dissolution
 14 matters. However, the Court granted the Trustee leave to amend the complaint to plead different
 15 theories of recovery, not dependent on a fraudulent transfer claim, with respect to those matters.
 16 (ECF No. 28 at 25-26.)

17 On March 27, 2014, Plaintiff filed the First Amended Complaint ("FAC"). (ECF No. 31.)
 18 In addition to reiterating the claims pleaded in the Original Complaint on which the Bankruptcy
 19 Court denied Jones Day's motion to dismiss, the FAC asserts new causes of action pertaining to
 20 the pre-dissolution matters for accounting and turnover under 11 U.S.C. § 542 (*id.* ¶¶ 172-181),
 21 equitable accounting under D.C. law (*id.* ¶¶ 182-190), and unjust enrichment under D.C. law (*id.*
 22 ¶¶ 191-200). The FAC reasons that *Jones Day* is liable to Howrey because D.C. partnership law
 23 imposes a duty *on dissociating partners* to "account to the partnership and hold as trustee for it
 24 any ... profit ... derived by the partner in the conduct ... of the partnership business." D.C. Code
 25 § 33-106.03(b)(3).

26 According to Plaintiff, D.C. partnership law imposes on Jones Day the duty to account to
 27 Howrey for the profits Jones Day that earned on the pre-dissolution matters are subject to the
 28

1 state-law duty to account. Jones Day disputes that any of the profits that Jones Day earned for
 2 work that Jones Day performed constitute profits “derived by” Howrey partners in the “conduct”
 3 of Howrey’s business. In any event, Plaintiff’s claims also fail for several additional reasons.
 4 There is no legal basis for Plaintiff’s equitable accounting claim against Jones Day because Jones
 5 Day has no fiduciary duties to Howrey. The doctrine of unjust enrichment is also inapplicable
 6 here because *Howrey* did not confer any benefit on Jones Day, and because there is nothing unjust
 7 about Jones Day retaining fees paid by clients for work that Jones Day performed. Finally,
 8 Plaintiff fails to state a claim under § 542 for accounting or turnover because, among other
 9 reasons, this provision does not create any property interest under state law, and Howrey has no
 10 state-law property interest that can be pursued against Jones Day for profits earned by Jones Day.

11 **III. THE NEED TO WITHDRAW THE REFERENCE IS ALL THE MORE**
COMPELLING IN LIGHT OF PLAINTIFF’S NEW CLAIMS

12 Plaintiff’s new claims underscore the immediate need for this Court to withdraw the
 13 reference.

14 *First*, Plaintiff’s new claims are based on an expansive and unprecedented interpretation
 15 of a dissociating partner’s duty to account—an interpretation that should be considered in the first
 16 instance by an Article III court. Under Plaintiff’s theory, any partner who changes law firms
 17 (under any circumstances) and his new law firm have a duty to account to the former firm for any
 18 profits earned by the new firm on matters for which clients terminated the old firm and retained
 19 the new firm. This theory would cause a sea change in the law governing the legal profession,
 20 and has enormous implications for law firms and the clients that they serve. If Plaintiff’s theory
 21 is adopted, the ability of lawyers to move from one firm to another (including lateral moves
 22 between two financially stable firms) will be severely impeded. More important, if law firms are
 23 forced to work for free on any matter previously handled by another firm, they will hesitate to
 24 take on such matters, and the access of clients to the counsel of their choice will be impaired. The
 25 public importance of this case makes it all the more critical that the controlling state-law
 26 questions governing potential liability be resolved at the highest appropriate judicial level.

1 *Second*, Plaintiff's new claims turn entirely on state law—an area in which the
 2 Bankruptcy Court has no special expertise. Plaintiff's unjust enrichment and equitable
 3 accounting claims arise directly under state law. And Plaintiff's claims for accounting and
 4 turnover under 11 U.S.C. § 542 depend entirely on the state-law question whether Plaintiff has
 5 any property interest in fees earned by Jones Day for work that Jones Day performed. *See Butner*
 6 *v. United States*, 440 U.S. 914, 55 (1979) ("Property interests are created and defined by state
 7 law. Unless some federal interest requires a different result, there is no reason why such interests
 8 should be analyzed differently simply because an interested party is involved in a bankruptcy
 9 proceeding."). The Bankruptcy Court for the Northern District of California has no special
 10 knowledge of these issues of D.C. law.

11 *Third*, if there is any uncertainty regarding the state-law questions at issue here, those
 12 questions may ultimately need to be resolved by the D.C. Court of Appeals. *Cf. In re Thelen*, 4
 13 N.E.3d 359 (N.Y. Ct. App. 2013) (accepting certified questions from the Second Circuit
 14 regarding the scope of the so-called unfinished business doctrine under New York law); *In re*
 15 *Coudert Brothers, LLP*, No. CTQ-2013-00010 (N.Y. Ct. App.) (same). Only the Ninth Circuit
 16 can certify questions to that court. *See* D.C. Code § 11-723(a). There is no reason to prolong
 17 proceedings in the Bankruptcy Court, a forum that has neither the authority nor the expertise to
 18 render a final decision on the relevant issues.

19 *Finally*, as Jones Day previously explained, it is undisputed that this Court will, at a
 20 minimum, have to review *de novo* any of the Bankruptcy Court's decisions on Plaintiff's claims
 21 against Jones Day. *See Stern v. Marshall*, 131 S.Ct. 2594 (2011); *Executive Benefits Insurance*
 22 *Agency, Inc. v. Arkison*, 702 F.3d 553, 565 (9th Cir. 2012) (relying on *Stern* and *Granfinanciera v.*
 23 *Nordberg*, 492 U.S. 33, 64 (1989), and holding that bankruptcy courts do not have the authority
 24 to enter final judgment on fraudulent transfer claims); *see also* 28 U.S.C. § 157(c) . The primary
 25 factor that courts consider when deciding whether to withdraw the reference is whether the
 26 bankruptcy court's decision would be subject to *de novo* review. *See In re Tamalpais Bancorp.*,
 27 451 B.R. 6, 10 (N.D. Cal. 2011). "Inasmuch as a bankruptcy court's determinations on non-core
 28

1 matters are subject to de novo review by the district court, unnecessary costs could be avoided by
 2 a single proceeding in the district court.” *Sec. Farms v. Int’l Bhd. of Teamsters, Chauffeurs,*
 3 *Warehousemen & Helpers*, 124 F.3d 999, 1009 (9th Cir. 1997) (citing authority); *see also Oliner*
 4 *v. Kontrabecki*, Case No. 06-03787, 2006 WL 3646789, at *2 (N.D. Cal. Dec. 12, 2006)
 5 (explaining that failing to withdraw claims subject to *de novo* review “arguably leads to a waste
 6 of judicial and other resources”). It would be a far more efficient use of judicial resources to
 7 withdraw the reference now rather than “substantially repeat[]” all of the Bankruptcy Court’s
 8 proceedings later. *Dev. Specialists, Inc. v. Akin Gump Strauss Hauer & Feld, LLP*, 462 B.R. 457,
 9 472 (S.D.N.Y. 2011) (withdrawing reference in Coudert bankruptcy).

10 **IV. CONCLUSION**

11 For these reasons, Jones Day’s motion to withdraw the reference should be granted.

12
 13 Dated: May 6, 2014

JONES DAY

14
 15 By: /s/ Jason McDonell
 16 Jason McDonell

17
 18 Attorneys for Defendant
 19 JONES DAY

20
 21
 22
 23
 24
 25
 26
 27
 28